No. 08-720

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In The

Supreme Court of the United States

MICHALE CALLAHAN,

Petitioner,

v.

STEVEN M. FERMON AND DIANE CARPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Seventh Circuit

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. Callahan, unlike the plaintiff in *Garcetti v. Ceballos*, has not acknowledged that his speech was made "pursuant to" his employment duties 1

II. Qualified Immunity is not a barrier to this Court's consideration of this case 7

TABLE OF AUTHORITIES

Page

CASE CITED:

Andrew v. Clark, 561 F.3d 261 (4th Cir. 2009) 1

Delgado v. Jones, 282 F.3d 511 (7th Cir. 2002).....8, 9

Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006) 6

Garcetti v. Ceballos, 547 U.S. 410 (2006).....*passim*

Gonzalez v. City of Chicago, 239 F.3d 939 (7th Cir. 2001) 8

STATUTES AND RULES CITED:

20 ILCS 2605/2605-50 4

OTHER AUTHORITIES CITED:

State Journal-Register, September 13, 2003 Newspaper article 3

Chicago Tribune, 1998 late summer Newspaper article.....3

I. Callahan, unlike the plaintiff in *Garcetti v. Ceballos,* has not acknowledged that his speech was made "pursuant to" his employment duties.

The Respondents' principle argument in this proceeding is that Callahan has conceded that his speech was made pursuant to his job duties. As such, they contend that this case mirrors the question presented to the Court in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). According to them, in each case it was undisputed that the employee's speech was made pursuant to his job duties. Ironically, before the District Court the Respondents argued that Callahan was not acting according to his job duties and that he was engaged in a rogue unauthorized investigation of his boss.[1]

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[1] During the course of the trial, which took place a year prior to the decision in *Garcetti*, the Respondents argued that Callahan's speech did not arise out of the performance of his normal job duties. In fact, the Director of the ISP testified that an ISP officer could not, as a permitted part of his job, investigate a superior officer. [Tr. 251]. During the course of closing arguments the Respondents argued at trial that Callahan had gone to DII "on a personal grievance, personal vendetta against Captain Fermon." [Tr. 1890]. In their opening brief to the Seventh Circuit the Respondents' acknowledged that Callahan's conduct was not in furtherance of his job assignment because his complaints to DII stemmed from an unauthorized investigation. [See p. 20-21 of Respondents' brief to the Seventh Circuit]. In fact, even the Seventh Circuit concluded that Callahan had engaged in a "surreptitious investigation of Cpt. Fermon." App.4.

Recently, the Fourth Circuit, in *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009), recognized that, to the extent, a memorandum

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Callahan's statements and the statements of his counsel upon which the Respondents rely to buttress their argument, only express his belief that as a sworn officer of the Illinois State Police ["ISP"] he was obliged to report misconduct. Unlike the situation in *Garcetti*, the Petitioner's speech was not made by him in performing an assigned job duty and he has never stated to the contrary.

On April 22, 2003, Callahan contacted the Director of ISP's Division of Internal Investigation ["DII"] and reported to him concerns that his supervisor, Captain Steven Fermon, might be involved in misconduct involving organized crime and may have interfered with a federal criminal investigation. [Tr. 557-559, 561; 1249-1252]. Callahan had reservations about going to DII, but after conferring with both an FBI agent and a former supervisor, he felt as though it was the appropriate thing to do. [Tr. 1272-1273 and 1277]. On May 22, 2003, Callahan met with DII representatives and shared, in detail, his concerns about Fermon. He also complained that Fermon's boss, Colonel Diane Carper, had repeatedly made comments that the Rhodes homicides were "too politically sensitive" and thus could not be investigated.[2]

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authored by a police officer and sent to a police commissioner complaining that a shooting may not be justified, was unauthorized. *Garcetti* would not strip that speech of its First Amendment protection. This runs contrary to the conclusion reached by the Seventh Circuit in this case.

[2] A truly shocking statement given that many individuals within the ISP believed that there was a very good likelihood

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[Plaintiff Ex.18]. FBI officials subsequently shared Callahan's concerns about Fermon with DII representatives. [Tr. 710-714].

DII is obligated to investigate complaints of misconduct that it receives from employees of the ISP and complaints that it receives from the general

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that two innocent people were in prison and there were strong suspicions that a politically connected businessman was linked to the murders. On September 13, 2003, the Springfield, Illinois *State Journal-Register* newspaper's lead editorial weighed in on the Steidl and Whitlock matter and stated:

> This case has been mismanaged and botched every step of the way going back to the murders of Dyke and Karen Rhoads on July 6, 1986. Herb Whitlock should not have to spend another day in prison, let alone another month, year or longer as prosecutors amble their way through a protracted appeals process. **No one in Illinois should stand by as this injustice continues.**

The evidence in the record shows that it is not terribly difficult to believe that former Illinois Governor George Ryan or his office might have put pressure on the ISP in this case. For example, in the Government's evidentiary proffer filed after the indictment of George Ryan, it referenced an incident when prosecutors were talking about developing more prosecutions of SOS employees and Ryan is alleged to have responded "Fuck you, Jack, these are my guys." The assistant prosecutor stated he was stunned by the statement "that Ryan's political people were not to be touched" [Callahan Summary Judgment 45-46]. Further, according to an article in the *Chicago Tribune* in late summer 1998 George Ryan's chief legal counsel attempted to bully a then DII commander into dropping an investigation into the license for bribes scandal. As a result, the commander, Earl Hernandez, resigned from the ISP [Callahan Summary Judgment 45-46].

public. Whether a complaint is from a citizen or from another ISP employee, it is handled by DII in the same manner. [Tr. 544]. DII is charged with the responsibility of investigating not only ISP employees, but all "employees under the jurisdiction of the Governor" of the State of Illinois. 20 ILCS 2605/2605-50. According to the Director of ISP, the majority of DII's investigations are not related to ISP personnel. [Tr. 548, 550].

Under ISP's directives [PER-030], an officer who observes misconduct is required to immediately report it to his supervisor and take it through his chain of command rather than to DII. Callahan deviated from this requirement in two important respects. First, he did not report it immediately, but waited for a considerable period of time. Second, like a citizen could, he reported it directly to DII rather than through his chain of command as was required of ISP officers.

Unlike the speech of the employee in *Garcetti*, which consisted of a memorandum containing a prosecutor's recommendations for the disposition of a case he was assigned, Callahan's speech involved reporting evidence of serious misconduct by his supervisors to a governmental entity charged by law to fully investigate corruption and unlawful behavior.

In reality, the Respondents argue that a logical extension of *Garcetti* is that speech by a public employee in reporting misconduct is not protected by the First Amendment regardless of the context of the

speech if an employee, under the policies of his employer, is obliged to report it. It is a fair question whether that notion was contemplated by *Garcetti,* given that the Court stated that "[w]e reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." 547 U.S. 410. Nonetheless, this was the view essentially taken by the Seventh Circuit relying upon *Garcetti.*

Because it was conceded in *Garcetti* that the speech at issue was made pursuant to the employee's job duties, this Court had no occasion to formulate "a comprehensive framework for defining the scope of an employee's duties in case there is room for serious debate." *Id.* at 1961.

This case presents that opportunity. It allows this Court to establish the contours of when an employee is speaking pursuant to his job duties. More particularly, does an employee who reports workplace misconduct forfeit First Amendment protection merely because the employer has a banal rule requiring all employees to come forward anytime they perceive wrongdoing?

A public employee, while at work for the government, like any other citizen, can be exposed to misconduct. Hopefully, a responsible public employer would expect that its employees would come forward and report such misconduct. Responsible citizenship requires no less of a duty. Where is the line to be drawn in public employee speech in this type of

situation between speech as a citizen and speech as an employee?

It is far from clear that Callahan's "admission" that he felt obliged to report misconduct renders his statements to DII to be made "pursuant to his job duties." For example, in *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), the Ninth Circuit reasoned that even after *Garcetti* a public employee has a right to complain of misconduct to an independent state agency "regardless of his status as a public employee." Those rights were not lost merely because of the communications occurred at work or were related to the subject matter of her employment. Accordingly, if the employee had a "responsibility as a citizen to expose such official malfeasance to broader scrutiny." *Id.* at 545.

The Respondents suggest this Court's review at this time is premature because *Garcetti* is only a few years old and the lower courts have not had significant time to resolve discrepancies arising in the wake of its decision. This argument ignores the concerns expressed by numerous lower courts that *Garcetti* has provided no guidance to the frequently difficult question of when an employee is speaking pursuant to his job duties and the holding in *Garcetti* does not adequately guide them in grappling with its application to particular cases.[3]

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[3] Throughout hi initial petition, Callahan references cases throughout the country that support this point.

The time is ripe for this Court to provide guidance as to when it is that speech by a public employee loses his First Amendment protection because his speech was pursuant to his job duties. Whether speech by a public employee is considered that of an employee rather than a citizen merely because his employer has a policy or rule requiring him to come forward to report misconduct is a question of significant importance in the development of First Amendment jurisprudence. Because of this Court's holding in *Garcetti*, the Seventh Circuit has answered that question in the affirmative. It is important for this Court to clarify if this was the result intended by *Garcetti*.

II. Qualified Immunity is not a barrier to this Court's consideration of this case.

The Respondents argue that because of the present uncertainty of the correct application of *Garcetti*, they should be entitled to qualified immunity. Qualified immunity, however, attaches based upon the state of the law at the time of the constitutional deprivation. The events giving rise to this case took place on June 16, 2003, nearly three years before *Garcetti* was decided.

In June of 2003, the law of the Seventh Circuit was compatible to the position advanced by the Petitioner in this case. At that time, it had recognized that speech arising out of an employee's routine performance of his day to day job duties represented

speech of an employee and not that of a citizen. *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001). In this respect, the *Gonzalez* court stated:

> If Gonzalez was writing reports of police misconduct, and his supervisors told him to rewrite the reports so as not to disclose police corruption, Gonzalez would have a First Amendment right to expose the police cover up to the public. But in that circumstance, Gonzalez would be acting beyond his employment capacity. Instead of simply performing his job of writing truthful internal reports, he would be speaking out as a citizen on a matter of public concern – a police cover up. *Id.* at 941.

In *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002), the Seventh Circuit distinguished speech arising out of routine work duties from speech of the type made by Callahan. In that case, a police officer reported misconduct involving the relative of an elected official and close friend of the police chief. The defendants, relying upon *Gonzalez*, argued that his speech was not entitled to First Amendment protection because he was duty bound to report that misconduct. The *Delgado* court rejected that argument because it "sweeps much too broadly." *Id.* at 519. It noted that:

> His disclosure went far beyond some rote, routine discharge of an assigned duty, as in *Gonzalez*. Our holding in *Gonzalez* is limited to routine discharge of assigned functions, where there is no suggestion of public motivation. In the case now before the court,

> Delgado's communications with his superiors were designed not only to convey information of possible crimes, but also additional facts that were relevant to the manner and scope of any subsequent investigation. Effective police work would be hopelessly compromised if police officers could be retaliated against for communicating factual details (e.g., a supervisor's relationship to a criminal suspect) that bear on the department's ability to conduct an objective investigation. The fact that a police officer's job responsibilities may in some measure overlap with motivations of a well-meaning citizen does not change this analysis. *Id.*

The position presently urged by Callahan was clearly established by the Seventh Circuit in June of 2003. In that respect, it was clear that an employee who was not performing his routine day to day job duties and who had complained of misconduct was entitled to First Amendment protection for his speech. If this Court clarifies when speech is pursuant to one's job duties in a manner consistent with *Delgado*, it will be doing nothing more than recognizing the principle that decision recognized.

Respectfully submitted,

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